RECENT AMERICAN DECISIONS.

SUPREME COURT OF MONTANA.

STATE OF MONTANA, EX REL THOMPSON v. KENNEY.

The Courts uniformly give credit to the result of an election which has been declared by a legally constituted canvassing board, until such result is set aside by a tribunal having jurisdiction to try and determine the right to the office in contest.

The Act of Congress, and the Constitution and Ordinances of the Constitutional Convention of Montana, declare exclusively who shall canvass the votes at the election for the approval of the Constitution and the choice of the first State officials.

An ordinance of a Constitutional Convention is a convenient method of separating temporary provisions from the body of the proposed Constitution; the force of such ordinance is the same as that of the proposed Constitution itself.

A member of the legislative assembly of Montana, whose compensation is fixed by law, is entitled to have the same audited and settled, upon proving his mileage and number of days of attendance; and the courts will enforce this right by mandamus.

This was a mandamus proceeding in this Court and the facts are fully stated in the opinion.

Elbert D. Weed, McCutcheon & McInture, and S. A. Balliet, for relator; Hon. *H. J. Haskell,* Attorney General, for the respondent.

HARWOOD, A. J., January 28, 1890. This action was commenced in this Court on the 17th day of January, A. D. 1890, by filing the relator's affidavit, upon which he prayed for the issuance of a writ of mandate directed to Edwin A. Kenney, auditor of the State of Montana, commanding him to forthwith audit and settle and issue relator a certificate for a certain alleged claim in favor of relator against the State of Montana in the sum of $339 for mileage and per diem for attendance as a member of the House of Representatives of the legislative assembly of the State of Montana.

The affidavit of the relator recites the following facts:

That affiant, William Thompson, is over 25 years of age, now is and has been for more than twenty-five years last past a resident of the Territory and State of Montana, and for three years last past has been a resident of the County of Silver Bow, the said County being one of the representative districts of the State of Montana. That, at the election held in the Territory of Montana on the first Tuesday of October, A. D., 1889, under the provisions of an Act of Congress entitled "An Act to provide for the division of Dakota into two States, and to

enable the people of North Dakota and South Dakota, Montana and Washington to form State Constitutions and State Governments, and be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889; and as further provided for by the Constitution, Ordinances and Schedule framed by the Constitutional Convention for the State of Montana, and adopted by the people thereof, the relator, William Thompson, was a candidate for election to the office of Representative in the Legislative Assembly of the State of Montana from said representative district, composed of the County of Silver Bow. That relator was voted for at said election, and was elected to the office of representative from said district. That the returns of said election were made by the various judges of election in said district to the clerk of said Silver Bow County, and that fifteen days thereafter the Chairman of the Board of County Commissioners of said Silver Bow County taking to his assistance two officers of said County, canvassed the returns of said election, and declared the result thereof so far as county officers were concerned, and that so far as the members of the Legislative Assembly were concerned, the returns of said election were made to the Secretary of the Territory of Montana. That thirty days after said election, all votes for the members of the Legislative Assembly were canvassed by the Governor, Chief Justice, and Secretary of the Territory of Montana, who then and there found, ascertained, declared, and certified that the affiant, William Thompson, was duly elected to the House of Representatives of the Legislative Assembly of Montana, as a member thereof, and that the said Governor and Secretary of the Territory of Montana, did deliver to affiant a certificate over their hands and seal of said Territory, certifying and declaring that at such election aforesaid affiant had been elected a member of the House of Representatives of the said Legislative Assembly.

That on the 23rd day of November, A. D., 1889, at 12 o'clock, noon, pursuant to the proclamation of the Governor of Montana, the Legislative Assembly of said State was convened and affiant appeared at the Capital of the State at that time, and in conjunction with twenty-nine other persons, who had, as aforesaid, been ascertained, declared and certified by the aforesaid canvassing board, composed of the Governor, Secretary and Chief Justice of the Territory of Montana, to have been elected from the various representative districts in said State, did meet as the House of Representatives of the State of Montana, at the Capital of said State, and in the place by them and the Auditor of said State agreed upon, of which place of meeting previous public notice had been given. That then and there, in a room provided for the purpose, the relator and said twenty-nine other persons convened and were called to order by the Auditor of the State of Montana, and thereupon the thirty members proceeded to qualify and organize the House of Representatives of the Legislative Assembly of the State of Montana, by the election of Aaron C. Witter, one of said members, as Speaker of the House of Representatives, and Benjamin Webster as Chief Clerk thereof. That such proceedings were then and there had by the members of the House, as that a committee thereof was appointed on credentials, to which committee the said thirty members presented severally a certificate signed by the Governor and Secretary of Montana, and over the seal of the Territory of Montana, certifying and declaring that each of them had been duly elected members of the House of Representatives of the Legislative Assembly of the State of Montana. That said committee on credentials then and there reported to the said House that the said thirty members aforesaid, including

affiant, were duly elected members of the House of Representatives of the Legislative Assembly of the State of Montana, and entitled to seats therein, which said report was approved and adopted by the said House.

That, thereafter, the said House continued to sit from day to day, from that date, to wit: November 23rd, A. D. 1889, to the date of the signing of affiant's affidavit, to wit: January 16th, A. D., 1890, and that affiant has attended said sessions, from that time until the time of making this affidavit, as a member of said House of Representatives, except on the 13th day of January, A. D., 1890.

That affiant travelled the distance of seventy-five miles in going by the nearest usually travelled route, from his residence to the capital of said State to attend said Legislative Assembly. That, on the 23rd day of November, A. D., 1889, the affiant and all the said twenty-nine members, took the oath prescribed by the Constitution of the State of Montana as members of the Legislative Assembly of the State of Montana, and that the said thirty members have attended upon the various sessions of the said House.

That on the 16th day of January, A. D., 1890, affiant presented to Edwin A. Kenney, who was then the Auditor of the State of Montana, at his office, an account against the State for his services and attendance as a member of the House aforesaid, at the rate of $6 per day, and mileage at the rate of 20 cents per mile for the distance travelled as aforesaid, as provided by law, and requested the said Auditor to audit and settle the said claim and give affiant a certificate thereof; but to audit and settle said claim or give affiant a certificate thereof, or any part thereof, the said Auditor did then and there refuse, nor would the said Auditor approve such claim, or any part thereof.

To which affidavit affiant attaches an account as "Exhibit A," which he verifies as a copy of the said account presented to said Auditor and referred to in his affidavit.

Upon this showing, an alternative writ of mandate was issued out of this court requiring the said Edwin A. Kenney, Auditor of the State of Montana, to forthwith audit and settle said claim against the Treasury of the State of Montana, and give to said William Thompson a certificate thereof, or to show cause before this court at 10 o'clock a. m., January 20th, A. D., 1890, why he had not done so.

To this process the respondent made his verified answer, wherein he expressly admitted in detail all the affirmative allegations set forth in the relator's affidavit. But in addition to such express admissions, the respondent alleged other matters, as follows:

"Defendant further says, that in the County of Silver Bow, which is a Representative District, ten persons were apportioned to be elected members of the House of Representatives. That as to the election of five of said persons, no controversy has arisen, but as to the said relator and four of his colleagues, sitting

with him in the House aforesaid, a controversy as to their election has arisen, and unless they are *prima facie* members of such House and entitled to act therein, no quorum has been present in said House, and the organization thereof has been without legislative authority. That the House is composed of thirty members, whose muniment of title is the ascertainment, declaration and certificate of the Canvassing Board, consisting of the Governor, Chief Justice and Secretary of the Territory of Montana, as provided in ordinance number two, passed by the Constitutional Convention of the State of Montana. That on the 23rd day of November, A. D., 1889, twenty-four persons from various representative districts in the State of Montana, who had been ascertained and declared to have been elected members of said House of Representatives, by the Governor, Chief Justice and Secretary aforesaid, under said Ordinance of the Constitution, did meet at another place in the capital of said State, and five members from the County of Silver Bow, one of whom assumed to have been elected in lieu of relator, met with said members last aforesaid, and having been declared not elected by the said Canvassing Board, provided for in said ordinance, did, nevertheless, assume to be members of the House of Representatives, and did then and there present as their muniment of title to said office, each a certificate signed by the County Clerk and Recorder of Silver Bow County, over his seal, certifying and declaring that such person was elected one of the Representatives of the district of Silver Bow County, as Representative in said House."

To the foregoing new matter set forth by respondent, the relator filed his replication, as follows:

First. The relator "denies that any controversy has arisen as to his election, and the election of four of his colleagues from the County of Silver Bow, as set forth in said answer.

Second. Avers that at the times the said House was organized, and when said House passed upon the report of the Committee on Credentials, as set forth in relator's application, a quorum of said House was present and acted therein."

The parties rested their case upon the allegations, admissions and denials in the pleadings above set forth, and upon the questions raised therein, the case was argued and submitted to the court for decision.

At the commencement of the consideration of the questions involved herein it is proper to notice the scope and effect of the relator's replication. He denies therein "that any controversy has arisen as to his election, and the election of four of his colleagues;" but he does not deny the further facts set out in respondent's answer. These specific facts alleged, stand unchallenged, and were urged upon the consideration of the court as ground for the refusal, on the part of the respondent, to audit and settle relator's claim, and to grant him a certificate thereof, as provided by law.

The relator relied upon the facts alleged in his affidavit, expressly admitted by respondent's answer, as grounds for the relief which he prayed for.

The effect of these pleadings raised questions of law only. No issues of fact were made upon which evidence could properly be introduced. The denial made by the relator's replication was nothing more than a denial of an immaterial allegation.

Compiled Statutes of Montana, Section 575 of the code of civil procedure, relating to the cases of mandamus, provides as follows:

"If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing the argument of the case."

This court is given original jurisdiction to hear and determine actions of this character by section 3, article 8, of the constitution of Montana, as follows:

"The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said Court shall have power, in its discretion, to issue and hear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary and proper to the complete exercise of its appellate jurisdiction."

In reference to the office of the writ of mandamus, the Compiled Statutes of Montana, sections 566 and 567, of Code of Civil Procedure provide as follows:

Sec. 566. It may be issued by any court in this State, except justice's, probate and mayor's court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Sec. 567. The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued, upon affidavit, on the application of the party beneficially interested.

It must now be determined whether, or not, the act, the performance of which is here sought to be compelled, is one which the law especially enjoins upon the respondent as a

duty resulting from his office as Auditor of this State. This involves two propositions:

First. Is the relator entitled, upon the facts shown, to have his claim audited and settled, and to receive a certificate thereof?

Second. Does the law enjoin upon the state auditor the duty of auditing and settling said claim, and issuing to relator a certificate thereof?

These propositions will be considered in the order stated.

To the high office of legislator, and to persons occupying that office, the law guarantees certain rights, privileges and emoluments, which courts of justice will regard and enforce in proper cases and upon proper showing: Constitution of Montana, Art. 5, Sections 5, 15; 1 Blackstone, 164 and notes and cases cited; Cushing Leg. Assemblies, Sections 546 to 957; Cooley's Cont. Lim., 162, 163; Jefferson's Manual; 1 Kent's Com. 235.

But in passing upon a question of this character, relating to a person claiming to be a member of the legislative Assembly of the State, this Court is mindful of the constitutional provision which places the power to try the ultimate right to the office, in another forum, *i. e.*, in the legislative house wherein the person claims a seat: Constitution of Montana, Art. 5, Sec. 9.

That body, and that alone, having the plenary jurisdiction to try the ultimate right to the office, it must be determined in the case at bar, on what character of *prima facie* evidence will courts of justice enforce collateral or incidental rights and privileges belonging to the members of the legislative Assembly. In other words, as applicable to this case at bar, what constitutes in the view of the courts of justice sufficient *prima facie* evidence of his membership in the House of Represenatives of this State to entitle the relator to the relief which he asks, that is, to have his claim to the emoluments of the office of representative from Silver Bow County, audited, settled and certified.

Under our republican form of Government election to this office is made by the votes of the legally qualified electors of the district in the manner prescribed by law, and the result of

such election is ascertained in the manner prescribed by law through the returns and canvass of such votes by legally constituted canvassing boards.

The courts have uniformly given credit to the result of an election, as ascertained and declared or certified by the legally constituted canvassing board to whom the law has committed the duty of canvassing the returns of the election, and declaring the result until this evidence of the election has been overborne by the trial and determination of the ultimate right to such office by the tribunal having jurisdiction to try and determine the same: *Crowell* v. *Lambert* (1865), 10 Minn. 369; *State* v. *Churchill* (1870), 15 Id. 455; *State* v. *Sherwood* (1870), 15 Id. 221; *People* v. *Miller* (1867), 16 Mich. 56; *Swinborn* v. *Smith* et al. (1879), 15 W. Va. 483; *Hulsman* v. *Rems* (1861), 41 Penn. 396; *Kerr* v. *Tiege* (1864), 47 Id. 292; *Commonwealth* v. *Baxter* (1860), 35 Id. 263; *DeArmond* v. *The State ex rel. Cambell* (1872), 40 Ind. 469; *Hadley* v. *City of Albany* (1865), 33 N. Y. 603.

This is not only the rule governing the action of courts, but it is the practice adopted in the organization of legislative bodies and admitting members thereto, until the *prima facie* evidence contained in the certificate of election issued by the legally constituted canvassing board is set aside by the proper authority in the determination of a contested election: Cush. Law and Practice of Leg. Assemb., Sections 141, 142 and 229 to 241, inclusive. The authorities reviewed and cited by this eminent author amply show the practice on this question: McCray on Elections, Sections 270 to 285, inclusive, and cases cited; Jefferson's Manual (12th Ed.), 390.

In the case at bar, it is asserted, and not denied, that another person holds a certificate of election to the same office which the relator claims to be occupying, issued by the County Clerk of Silver Bow County. It therefore becomes necessary, in the determination of this case, to ascertain what board, or person, is by law authorized to canvass the returns of the election in question, and ascertain and certify the result, so as to entitle the person holding that muniment of title to the office, *prima facie*, to maintain his case in an action of this character. If the right of relator to the certificate of election which he

holds is challenged, let the question be raised and determined in the proper form; but if the legislative body of which the relator claims to be a member, vested as it is with the powers which the Constitution of this State has committed to it, and in view of the long line of precedents which have guided the actions of such bodies in like cases, does not determine a controversy as to the election of the relator, then in the nature of the case there exists no better evidence of his right to relief than the finding or certificate of the legally constituted canvassing board charged with the duty of ascertaining the result of the election in question. The title to an elective office, in a majority of cases, rests on this *prima facie* evidence, because in the great majority of cases there is no adjudication of the right to the office which inquires back of the returns of the proper canvassing board. It is proper to observe here that under well established rules of law, if it was shown that a contest of the election of the relator was pending in the House of which he claims to be a member, and to which he holds a certificate of election, then this Court would withhold judgment until the case was determined, but no such fact appears.

The relator's certificate of election emanates from a canvassing board composed of the Governor, Chief Justice and Secretary. The other certificate, which is set up in opposition to this, is held by another person, emanates from the County Clerk of Silver Bow County, accredited under the hand and official seal of that officer; and this is not denied by the relator.

In the absence of any mention of this latter certificate, the consideration of this case necessarily involves the question as to whether the relator's certificate of election issues from the legally constituted Canvassing Board, charged with the duty of ascertaining, from the returns, the election of members of the House of Represenatives. The *prima facie* right to relief rests upon the credentials, with the facts of service.

The act of Congress above mentioned, enabling the people of Montana and other Territories to form and adopt constitutions and set up state governments, provides in Sec. 8, as follows:

"At the elections provided for in this section, the qualified voters of said pro-

posed States shall vote directly for or against the proposed Constitution, and for or against any articles or propositions separately submitted. The returns of such election shall be made to the Secretary of each of the said Territories, who, with the Governor and Chief Justice thereof, or any two of them, shall canvass the same."

Section 9 of the same Act provides as follows—

"That until the next census, or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the Fifty-first Congress, together with the Governors and other State officers provided for in said Constitutions, may be elected on the same day of the election for the ratification or rejection of the Constitutions; and until said State officers are elected and qualified under the provisions of each Constitution, and the States respectively are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories."

Section 24 of the same Act provides as follows—

"That the Constitutional Convention may, by ordinance, provide for the election of officers for full State Governments, including members of the Legislature and Representatives in the Fifty-first Congress; but said State Governments shall remain in abeyance until the State shall be admitted into the Union respectively, as provided in this Act. In case the Constitutions of any of said proposed States shall be rectified by the people, but not otherwise, the Legislature thereof may assemble, organize and elect two Senators of the United States; and the Governor and Secretary of State of such proposed States shall certify the election of the Senators and Representatives in the manner required by law, and when such State is admitted into the Union, the Senators and Representatives shall be enabled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State Governments formed in pursuance of said Constitution, as provided by the Constitutional Convention, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this Act, or by the Constitutions of the States respectively."

Section 25 of the same Act provides as follows—

"That all Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the Legislatures of said Territories or by Congress, are hereby repealed."

Having reviewed these provisions of the enabling Act of Congress, we will proceed to the Constitution of Montana, and consider its provisions upon this subject.

"Schedule," section 1, provides as follows—

"The laws enacted by the Legislative Assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this Constitution, or the Constitution or Laws of the United States of America, shall be and remain in full force as the Laws of the State, until altered or repealed, or until they expire by their own limitations."

Section 17 of the schedule provides as follows—

"All Territorial, county and township officers now occupying their respective positions under the laws of the Territory of Montana, or of the United States of America, shall continue and remain in their respective official positions and perform the duties thereof as now provided by law, after the State is admitted into the Union, and shall be considered state officers until their successors in office shall be duly elected and qualified, as provided by ordinance, notwithstanding any inconsistent provisions in this Constitution, and shall be entitled to the same compensation for their services as is now established by law; provided that the compensation of Justices of the Supreme Court, Governor and Secretary of the Territory, shall be paid by the State of Montana."

Passing to ordinance number two, referred to in the last section, ordained and promulgated by the Constitutional Convention, with the Constitution of the State, and adopted by the people, we find provisions as follows—

"First. That an election shall be held throughout the Territory of Montana on the first Tuesday of October, A. D. 1889, for the ratification or rejection of the Constitution framed and adopted by this Convention."

"Fifth. The votes cast at said election for the adoption or rejection of said Constitution shall be convassed by the Canvassing Boards of the respective Counties not later than fifteen days after said election, or sooner if the returns from all the precincts shall have been received, and in the manner prescribed by the laws of the Territory of Montana for canvassing the votes at the general elections in said Territory. And the returns of said election shall be made to the Secretary of the Territory, who, with the Governor and the Chief Justice of the Territory, or any two of them, shall constitute a Board of Canvassers, who shall meet at the office of the Secretary of the Territory on or before the thirtieth day after the election and canvass the votes so cast and declare the result."

"Sixth. That on the first Tuesday in October, A. D. 1889, there shall be elected by the qualified electors of Montana, a Governor, a Lieutenant-Governor, a Secretary of State, an Attorney General, a State Auditor, a Superindendent of Public Instruction, one Chief Justice and two Associate Justices of the Supreme Court, a Judge for each Judicial District established by this Constitution, a Clerk of the Supreme Court, and a Clerk of the District Court in and for each County of the State, and the members of the Legislative Assembly provided for in this Constitution. The terms of the officers so elected shall begin when the State shall be admitted into the Union, and shall end on the first Monday in January, A. D. 1893, except as otherwise provided."

"Seventh. There shall be elected at the same time, one Representative in the Fifty-first Congress of the United States."

"Eighth. The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the Secretary of the Territory and canvassed in the same manner, and by the same Board, as is the vote upon the Constitution, except as to Clerk of the District Court."

It is clear that said Act of Congress, legislating for the people of the Territory of Montana, supplemented and carried out by the Constitution and Ordinances framed and promulgated by the Constitutional Convention, and ratified by the people of the Territory, covered the whole question as to what Board should canvass the votes cast at the late election, both for and against the Constitution, and for members of the Legislative Assembly, and State and District officers, and declare the result.

The fifth paragraph of Ordinance two, above quoted requires that the returns of said election for the adoption or rejection of the Constitution—

"Shall be made to the Secretary of the Territory, who, with the Governor and the Ch ef Justice of the Territory, or any two of them, shall constitute a Board of Convassers, who shall meet at the office of the Secretary of the Territory on or before the thirtieth day after election, and canvass the votes so cast, and declare the result."

The eighth paragraph of the same Ordinance provides—

"That the votes for all the State officers, members of the Legislative Assembly and District Judges, shall be returned and canvassed in the same manner and by the same Board as is the vote upon the Constitution."

It is contended by the respondent, that a statute of the Territory of Montana, existing prior to the said Act of Congress, and prior to the adoption of the Constitution, provided, contrary to the Act of Congress and the Constitution and Ordinances above quoted, in that this statute provides that the canvass of the votes cast for members of the Legislative Assembly shall be made by the Boards of County Commissioners of the respective Counties in the Territory, and certificates of election shall be issued by the Clerk of the Board of County Commissioners: Compiled Statutes, section 1033, page 930.

This position is untenable. There are no statutes of the Territory of Montana brought over and adopted by the peo-

ple of this State, contrary or in conflict with the Constitution thereof, for this plain reason: It is provided by the Act of Congress above quoted, enabling the people of said Territory to form a Constitution and State Government, that—

"All laws in force made by said territories at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this Act, or by the Constitutions of the States respectively." S. 24, *supra.*

This provision was further amplified by Section 1 of "Schedule," of the Constitution of Montana, *supra.* By these provisions the statute law of Montana Territory is remoulded at once to join in harmony with the State Constitution.

An example of this modification or remoulding of the statute law to harmonize with the Constitution, is found in reference to the constitution of the grand jury. The express letter of the statute in force at the time the State was admitted into the Union, provided that this body should consist of sixteen persons in number, of whom twelve could find a "true bill." The State Constitution provides that the grand jury shall consist of seven persons, of whom five are competent to find an indictment. It has been abundantly provided, by the Act of Congress and the State Constitution, that the statute is in force as modified by the Constitution, and it cannot be maintained, either as a logical or reasonable conclusion that there is a conflict, where the latter, and paramount organic law, has expressly adopted the former statute law, as modified by the Constitution: *State* v. *Ah Jim* (decided in the Sup. Ct. Montana, January 14, 1890).

Counsel for respondent, in this connection contends, that the Ordinances framed by the Constitutional Convention, and appended to the Constitution, were not a part of that instrument, and did not have the force and effect of constitutional provisions. For this reason, the provisions of the ordinance declaring that the Governor, Chief Justice and Secretary of Montana, should constitute a Canvassing Board to canvass the votes and declare the result of the election of members of the Legislative Assembly, was impotent to work a change or modification of the statute, providing that the certificates of election of such members shall be issued by the County Clerk. Hence that statute stands in full force, and the County Clerk's

certificate is the best *prima facie* evidence of a party's right to a seat in the Legislative Assembly.

No authorities have been brought to the attention of the court to sustain the respondent's position in respect to Ordinances framed and promulgated by Constitutional conventions.

It appears this question was raised in the case of *Stewart* v. *Crosby* (1855), 15 Texas, 546, wherein Justice WHEELER, in passing upon this point, says:

"We think it free from doubt that the Ordinance appended to the Constitution is a part of the fundamental law of the land. Having been framed by the Convention that framed the Constitution of the State, and adopted by the Convention and the people, along with the Constitution, it is of equal authority and binding force upon the executive, legislative and judicial departments of the government of the State, as if it had been incorporated in the Constitution, forming a component part of it."

The case cited appears to have involved questions of great importance, as shown by the remarks of the judge at the commencement of the opinion, as follows:

"In the argument of this case, questions of great moment to the parties, involving an inquiry respecting the constitutionality of the legislative enactments, which they have invoked, and on which they rely to maintain their claims, have been discussed."

Mr. Paine, in his work on elections, section 294, announces the same doctrine, as does the case of *Stewart* v. *Crosby*, *supra*, in the following terms:

"To launch a new constitution, certain machinery and arrangements are always necessary, which having subserved this single purpose, are of no further use. These might, of course, be provided in the constitution itself; but to incorporate temporary provisions into the body of a permanent constitution, would be to encumber the instrument with matter which might more properly be excluded from the text of the constitution, and placed in such a form as to be dropped when all the uses for which it was provided, have been fully subserved. Accordingly, these provisions for inaugurating new state constitutions, usually take the form of detached ordinances, or schedules. The validity and effect of these provisions are precisely the same, whether they are placed in the ordinance or schedule, to be thrown aside when no longer needed, or imbedded in the text of the constitution, to remain a permanent blemish, after the accomplishment of all the purposes for which they were required. It is clearly competent for a constitutional convention, by an ordinance or schedule, to change the time for holding the general election of the state. * * * The people of the state in their constitutional conventions are always their own masters. There is nothing to restrain them from giving whatever form they prefer to its organic law, except the Constitution of the United States and treaties made and laws enacted by the United States in pursuance thereof."

To declare that the County Clerk's certificate of election to the office in question is the highest *prima facie* evidence of title to the office, as against the certificate of the Canvassing Board constituted by the act of congress, and the ordinance framed by the constitutional convention and adopted by the people, would be in effect to declare that the provisions of the statute in this respect stand without modification by the Act of Congress and Constitution and Ordinances, and prevail over them. If the Ordinance did not work a change in the statute, in this particular, how can it be maintained that the same ordinance worked such important changes in other respects? The effect of ordinance Number Two was to determine the terms of all the elective officers of the Territory of Montana, while under the literal statutory provisions, their terms of office would have continued for more than a year. And under that theory, the officers elected at the late election, under this ordinance, who have taken possession of these offices, are there without authority.

The logical analogies of this theory need not be further traced. It destroys itself by its inherent fallacy, without the force of the authorities above quoted to the contrary.

The Constitutional Convention was authorized, by Act of Congress, to make provision, "by ordinance" for the election of officers for full state government.

In the body of the constitution, at Section Seventeen of the Schedule, the state officers to be "duly elected and qualified, as provided by ordinance," are referred to. The Ordinance was framed and adopted by the Convention, promulgated to the people, and by them ratified.

The provisions of the Constitution and Ordinance, relating to carrying out the election, to set in motion the state government, was intended for immediate execution within a short time after the constitution was framed. The plain intent of the convention when framing Ordinance Number Two is shown in the provision dividing the state, legislative and district officers into one class, and directing that the returns of the election of these officers should be made to the Secretary of the Territory, and canvassed in the same manner and by the same Board as the vote upon the Constitution. And in the

"ninth" paragraph of that ordinance, the election of the county and township officers was provided for. And the "tenth" paragraph provides that the votes for the above county and township officers, and for Clerk of the District Court, shall be returned and canvassed as is now provided by law.

The effect of the Ordinance upon the statute is to change and modify its provisions so far as is necessary to give the provisions of the Ordinance full scope and effect. It follows that the relator's certificate of election emanates from the legally constituted canvassing board and will be admitted in this action as *prima facie* evidence of his election to the office in question.

The facts of attendance upon the sessions of the house, and as to distance traveled are asserted by the affidavit of the relator, and admitted by the verified answer of respondent. No question has been raised upon these matters, set forth in relator's affidavit.

The constitution of the state fixes the amount of compensation at $6 for each day's attendance and 20 cents per mile for each mile necessarily traveled, by the nearest usually traveled route in going to the seat of government from the member's residence, and returning thereto. And the relator's claim conforms to these prescribed rates.

It remains to be determined whether the law enjoins upon the State Auditor the duty of auditing and settling said claim and issuing to the relator a certificate thereof.

Section 121, Fifth Div. Comp. Statutes, provides as follows:

"He shall audit all claims against the treasury and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim and give the claimant a certificate thereof, and report the same to the legislative assembly."

This provision of the statutes should be considered in connection with section 20 of article 7, of the State Constitution, which provides as follows:

"Section 20. The Governor, Secretary of State and Attorney General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the state prisoners as may be prescribed by law. They shall constitute a Board of Examiners with power to examine all claims against the State, except salaries, or compensation of officers fixed by law,

and perform such other duties as may be prescribed by law. And no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislative Assembly without first having been considered and acted upon by said board."

The section of the statute above quoted provides that the Auditor " shall audit all claims against the treasury, and when the law recognizes the claim, but no appropriation has been made therefor, shall settle the claim and give the claimant a certificate thereof, and report the same to the legislative assembly." The Constitution has created a Board of Examiners, with power to examine all claims against the State, except salaries or compensation of officers fixed by law, and provides that " no claims against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board."

The salaries or compensation of officers fixed by law, being expressly in all cases excepted by the provisions of the Constitution, from the action of said Board of Examiners, the duty of the State Auditor, under the statute, is clear as to the relator's claims. No other class of claim against the State is presented in this action than the compensation of an officer fixed by law. However, it is deemed proper to consider the statutory and constitutional provisions together, so that no misapprehension will arise as to the decision herein.

The relator asks that his claim against the State for compensation for service as a member of the House of Representatives of the legislative assembly of this State, for the fifty-four days attendance at the sessions of that body, together with mileage for seventy-five miles traveled by the nearest usually traveled route from his residence to that assembly, at the rate fixed by law, amounting to $339, be audited and settled, and that a certificate thereof be given him by the respondent, Edwin A. Kenney, Auditor of the State of Montana. Under the provisions of law and the showing in this action, it is held by this court that the relator is entitled to the relief prayed for; that the relief prayed for is a duty specially enjoined upon the State Auditor as resulting from

his office; that the writ of mandamus is the proper remedy herein.

WHEREFORE, It is ordered that a peremptory writ of mandate be issued in the form provided by law, as prayed for in relator's affidavit.

Note.—Chief Justice Blake having been a member of the Canvassing Board mentioned in the above opinion, did not sit in the hearing and the determination of this action.

In Pennsylvania a new Constitution was prepared by a Convention authorized to be held by an Act of Assembly, approved April 11, 1872 (P. L. 53), and was adopted by a considerable majority at an election held on the sixteenth of December, 1873. The Convention had provided by the Schedule annexed to the proposed Constitution, that *Section 1.* "This Constitution should take effect on the first day of January, in the year 1874, for all purposes not otherwise provided for therein." The Act of 1872 (§6), provided for the counting of the votes and a proclamation of the result of the election by the Governor; and if a majority of the votes were polled for the proposed Constitution, such new or revised Constitution should be thenceforth, the Constitution of this Commonwealth. The possible conflict between the Schedule and the Act of Assembly, matured by the counting of the votes on the sixth day of January, 1874, and the proclamation of the Governor on the seventh day of January, 1874. This action was in accordance with a decision (*Wells et al.*, v. *Bain et al.*, December 6, 1873, 75 Pa. 39), upon an application for an injunction from the Supreme Court of Pennsylvania, to restrain the holding of the election of December 16, 1873, so far as concerned the City of Philadelphia, by special officers chosen by the Convention, in lieu of the regular election officers. The injunction was granted upon the ground that the Convention derived its powers from the Act of 1872, which provided for the conduct of this election "as the general elections of this Commonwealth are now by law conducted;" (§6.) consequently, an Ordinance of the Convention could not contravene the law.

Wells v. *Bain* was followed by *Woods Appeal*, decided November 2, 1874, and reported in the same volume (75 Pa. 59). The Supreme Court affirmed the cardinal doctrine that the Convention had no absolute authority. "The people have the same right to limit the powers of their delegates" to a constitutional convention, "that they have to bound the power of their representatives" in the legislature.

"The question is not upon the power of the legislature to restrain the *people*, but upon the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. When a people act through a law, the act is theirs, and the fact that they used the legislature as their instrument to confer their powers, makes them the superiors, and not the legislature. The idea which lies at the root of the fallacy, that a convention cannot be controlled by law, is that the convention and the people are identical. But when the question to be determined, is between the people and the convention, the fallacy is obvious. * * * No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a

new government. Governments, thus accepted and ratified by silent submission, afford no precedents for the power of a convention in a time of profound tranquillity, and for a people living under self-established, safe institutions:" AGNEW, C. J. pp. 71, 72, 73; the same effect is the opinion of the Justices, January 23, 1883, 6 Cushing (Mass.) 573.

Notwithstanding these sentiments, SHARSWOOD, J., in *Northampton Co.* v. *Lehigh C. & N. Co.*, decided May 11, 1874, and reported in the same volume (75 Pa. 461), incidently remarked "the Constitution did not go into operation until January 1st, 1874, Schedule, Sec. 1." This quite agrees with ruling in Texas: *infra* page 245.

This Pennsylvania incident is cited as a strong method of distinguishing the principal case in several particulars. And, first, in the principal case, unlike that in Pennsylvania, no question did or should arise as to the power of the convention to make an ordinance. Consequently a discussion of the powers of a constitutional convention may be omitted here, with the caution that the language quoted on page 235 is entirely too loose even for the purposes of the principal case. Second, both in Pennsylvania and in Montana, schedules were properly appended to the proposed constitutional provisions; this will appear from a brief examination into the functions and force of such temporary additions.

The true function of a schedule or ordinance accompanying a proposed Constitution and submitted for the approval of the voters at the same time, came up for decision in *Wattson* v. *Chester & D. R. R. R. Co.* (1877), 83 Pa. 253, 255. The Court, speaking through Chief Justice AGNEW, said that the Schedule to the Pennsylvania Constitution of 1874 was "intended to bridge over the chasm between the two frames of government, and make the transition, from one to the other, easy and without unnatural disturbance of the affairs of the people." To the same effect are *Sigur* v. *Crenshaw* (1853), 8 La. An. 401, 422; citations *ante* page 235; *The Comm. ex rel.* v. *Collins* (1839), 8 Watts. (Pa.,) 348, 336; *Plowman* v. *Thornton*, (1875), 52 Ala. 559, 568. *Griffin's Ex'r* v. *Cunningham*, (1870) 20 Grat. (Va.) 31; The *Richmond Mayoralty Case* (1870), 19 id. 673.

Such being the purpose of these additional documents, their force may readily be inferred and has not involved much contention. Thus, in *Ridley* v. *Sherbrook* (1866), 3 Coldw. (Tenn.) 569, 575, the effect of a schedule, submitted and adopted by the requisite ballots, was discussed. Lack of time prevented more than an announcement of the decision, that "the provisions of the Schedule, for all the purposes for which they were designed, [became part of the Constitution], and had all the force of constitutional provisions." Hence the provisions of the ninth section of the Schedule, authorizing the General Assembly, at its first ensuing session, to fix the qualification of voters, was valid and abrogated the provisions of the previous Constitution of 1834.

This Tennessee decision was followed in *State* v. *Johnson* (1870), 26 Ark. 281, being the only one on the point, accessible to the Supreme Court of Arkansas.

Years before, the same result had been reached in Pennsylvania in *The Comm. ex rel.* v. *Collins* (1839), 8 Watts. (Pa.) 331, 335, 348, and, also, in 1855, in Texas, *supra* p. 235.

It is true that an Ordinance appended to the Constitution of Alabama, framed in 1819, was denied to be such part of

that instrument as only to be "abrogated and annulled in the same manner as any other part:" GOLDTHWAITE, J. *Duke* v. *Cahawba Nav. Co.* (1846), 10 Ala. 82,88. The Ordinance provided, among other things, that "all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State; and this Ordinance is hereby declared irrevocable, without the consent of the United States." (1 Poore's Const. 46.) This Ordinance was merely the acknowledgment of this obligation, laid upon the Convention by §6 of the enabling Act of March 2, 1819; 3 Stat. at L. 492. The State, by Act of January 10, 1827, incorporated the Navigation Company and authorized it to charge and collect tolls: to this Act Congress gave assent by their Act of May 24, 1828; 4 Stat. at L. 308. The Alabama Court very properly said, that "The State Government being invested with the entire authority of the people, except where they have chosen to restrict the government, it follows that all the external relations of the people, with the citizens of other States, or with the Government of the United States, must be conducted by the State government. The Ordinance itself indicates that it is revocable with the consent of the United States, and as the consent of the people of this State can only be expressed through the State government, it follows that when the assent of both is given by the constituted authorities of each, the powers disclaimed, may be resumed and immediately exercised by the State authorities, under the general powers, these not being restricted otherwise than by the Ordinance." (10 Ala. 88–9.) All this is still true, and was precisely the course taken during the reconstruction of the Southern States, the State Legislatures being required to make certain alterations in the proposed Constitutions before Congress would approve them; see the cases of *Shorter* v. *Cobb*, (1869), 39 Ga. 285, 303-4; *Hardemann* v. *Downer* (1869), id. 425, 443-4; *Peak* v. *Swindle* (1887), 68 Texas 242, 248; *The State* v. *Williams* (1873), 49 Miss. 640, 661; *Plowman* v. *Thornton*, (1875) 52 Ala., 559, 565.

A Schedule, or Ordinance, proposed by a Constitutional Convention and within the powers confided to such a body, has now sufficiently appeared to be of equal force with the provisions of the amendment or new constitution itself, and, therefore, the question may now be considered as to the time when a constitutional provision becomes the supreme law.

As some of the cases to be cited, arose from the reconstruction of the Southern States, and a full discussion of these cases would involve the powers of Congress, much in the same manner, as the principal case might equally challenge those powers, it will not be amiss to state briefly that there are three theories of the time when the transformation occurs from a Territory of the United States into a State of and in the Union. Beyond this, the discussion of the powers of Congress is unnecessary and would distract from the main question for this annotation: that is, *at what time is a constitutional provision the supreme law?*

The three theories were alluded to in the opinion delivered in *Secombe* v. *Kittelson* (1882), 29 Minn. 555, 559, as follows: *First*, that the adopted Constitution of the new State cannot take effect, and the new government cannot go into operation, until Congress admits the State into the Union. This would leave the State still a Territory, until admission. This theory has been

exploded by the decisions upon the reconstruction Constitutions of Virginia, Mississippi and Texas, *infra*.

Second, that the adoption of a State Constitution, under the provisions of an enabling Act of Congress, and the formation of a State government, create a State, although not in the Union. This theory seems to be the proper one and to exclude any effort to organize a State without permission of Congress: *Shorter* v. *Cobb* (1869), 39 Ga. 285, 298, 299; *Hardeman* v. *Downer* (1869), id. 425, 443.

Third, that compliance with any conditions required by Congress, (as the ratification of the last amendment to the Constitution of the United States,) is sufficient to complete the organization of the State. This theory does not seem to be law, under the Virginia, Texas and Mississippi decisions, *infra*.

Coming now to the consideration of the question as to when the constitutional provision becomes the supreme law, and overrides previous constitutions and laws, the argument presented for the respondent may be observed; for it will appear to be a suitable introduction to the answer required to sustain the Montana Court.

No doubt the contention in the principal case was based upon a sound premise, considered by itself. That is, if there had been no Ordinances of the Convention and no provisions in the Act of Congress authorizing such Ordinances, the Constitution, when adopted, would have required legislation to put it into operation, and would seem to be subject to the same rule of common sense which perpetuates former legislation when a State adopts a new Constitution or amends an existing one. That is, where legislation is necessary to give effect to constitutional provisions and former legislation is not abrogated by the new provisions, such former legislation continues until new laws are enacted: *Cahoon's Case* (1871), 20 Grat. (Va.) 733,789; (composition of grand juries); *Supervisors* v. *Stout* (1876), 9 W. Va. 703,705 (road juries).

Perhaps it might be safe to go further and say that where legislation is not necsary for the operation of the new constitutional provisions, that a literal interpretation will not be adopted unless absolutely required. This may be understood from the following case, though the decision there finally turned upon the necessity of legislation to enforce the plain prohibition.

The effect of the third section of the Fourteenth Amendment to the Constitution of the United States, came into consideration before CHASE, C. J., in *Cæsar Griffin's Case*, heard in the United States Circuit Court for the District of Virginia at May term, 1869, and reported in Chase's Dec. 364-426. The words of the Amendment are: "3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Under this section, Griffin prayed for discharge, under a *Habeas Corpus*, from a conviction in a criminal court presided over by a person who had, as a member

of a State legislature, engaged in insurrection or rebellion against the United States. The discharge was refused, CHASE, C. J., saying—"In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument it is true, cannot prevail over plain words or clear reason. But, on the other hand, a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference. * * * * But, in all these [Southern] States, all offices had been filled, before the ratification of the Amendment, by citizens who, at the time of the ratification, were actively in the performance of their several duties. Very many, if not a majority of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the Constitution, and had afterwards engaged in the late rebellion; and most, if not all of them continued in the discharge of their functions after the promulgation of the amendment, not supposing that, by its operation, their offices could be vacated without some action of Congress. If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers." (pp. 417, 418.) And after alluding to the fifth section, the Chief Justice proceeded,—"Taking the third section then, in its completeness with this [its] final clause, it seems to put beyond reasonable question, the conclusion that the intention of the people of the United States, in adopting the Fourteenth Amendment, was to create a disability, to be removed, in proper cases, by a two-thirds vote, and to be made operative in other cases, by the legislation of Congress, in its ordinary course." (p. 422.)

So far as confirming the power of such a *de facto* judge, the Chief Justice announced (pp. 425–6) that he was authorized to say that his action was in accordance with the unanimous opinion of the other Judges of the Supreme Court of the United States, who had examined into the case upon an application for a writ of prohibition against the United States District Judge who had ordered the discharge of Griffin upon this *Habeas Corpus*. The case came before the Chief Justice on an appeal from the District Judge's order of discharge.

The principle here upheld was before the judges of the reconstructed States, but was properly thought inapplicable where legislation was not needed: see especially the opinion in *The State* v. *Williams*, (1873), 49 Miss. 640, 664. 682, where *Musgrove* v. *Leachman* (1871), 45 id. 511, was distinguished.

When the Territory of Minnesota passed into the State of that name, the difference between the Territorial law and the Constitution of the new State, gave rise to the case of *Parker* v. *Smith* (1859), 3 Minn. 243. The defendant was elected to be the District Attorney of Dakota County, at the same, as the electors voted for the proposed Constitution of the new State, but his time of residence had been insufficient under the Territorial laws to become a candidate for office, though ample under the Constitution then approved by the necessary ballots of the electors. The Territorial laws were applied, the Court saying, that "the Constitution was not operative until after its adoption by the people, and did not change any rights, duties, requirements, or obligations that were created by, or dependent upon any Territorial act until it had received such sanction." Not that the Court took the Pennsylvania and New York view of the adoption when the votes had

been fully counted: *Infra.* page 247 A far less tenable theory was advanced: "At the election in October, 1857, at which the Constitution was submitted, there were two distinct elections, although held on the same day and at the same places, for convenience. This was absolutely necessary in the event of the Constitution being rejected by the people, in which case all the votes cast for any of the officers created by the Constitution, would have been of no effect, and the whole State scheme would have fallen to the ground, and the Territorial form of government would have continued as if no such election had taken place, and all the officers, from Delegate to Congress to those of precinct jurisdiction, elected under the Territorial Laws, would have entered upon their functions precisely as they did the previous year." FLANDRAU, J., (id.) 243-4. But this theory overlooks the origin of the new officers, such as members of Congress, as well as those of the same function in Territory and in State, and was probably based upon the language of the enabling act of Congress (February 26, 1857, 11 Stat. at Large 166) which differed from the enabling act for Dakota, Montana and Washington (February 22, 1889, 25 Stat. at Large 676), in authorizing the Convention (§ 3) to determine whether the people desired admission as a State, and if so, authorized the framing and submission of a constitution, and, also, (§ 4) in the event said convention shall decide in favor of the immediate admission of the proposed State into the Union, providing for a special census for the basis of the representation in Congress. In the Act of 1889, no State could come into existence without adopting its Constitution (§§ 7 and 24) and the difficulties which might arise from use of this theory, can be inferred from reflection upon the case of *Secombe* v. *Kittelson* (1882), 29 Minn. 555, where the Court dismissed a discussion upon the power to amend the State Constitution, not yet in force according to this theory, by a rough and ready and common sense short cut, that this amendment had afterwards been amended out of the Constitution: (id. 561.)

The weight of *Stewart* v. *Crosby*, *ante* page 235, is much diminished by the absence of any explanation of the reasons upon which it is founded. "The time remaining will not permit an extended discussion of even the material questions in the case, on which its decision depends. But as a decision at the present Term is earnestly desired by the parties, and may be important to the attainment of their rights, we shall proceed to dispose of the case, upon grounds deemed clear and sufficient to determine the litigation between the parties; and shall state only our conclusions upon the material questions involved in the decision; so as to indicate distinctly the grounds of our judgment; reserving for a future occasion, it may be for a future case, the statement at length of the reasons on which we rest our conclusions:" WHEELER, J. pp. 547–8.

Perhaps the disposition of the Texas judges can be fathomed after consideration of a much later decision rendered by their Supreme Court, in the case of *Peak* v. *Swindle* (1887), 68 Texas 242, which turned on the suspension of the Statute of Limitations during the secession period, by the reconstruction Constitution. "The inquiry as to when the Constitution, ratified by the people in 1869, became operative, is now directly presented; and if it be true that it so became when ratified by the people, it is clear that the instructions given were correct and that the judgment, as to the appellee, must be affirmed. * * * * These acts, which led to the formation of the Constitution,

its adoption, and the admission of the State to representation in Congress, not only evidence the opinion of Congress, that the Constitution took effect before the State was admitted to representation, but also evidence the intention of the people, from whose will alone a constitution could have an existence, that it should be operative prior to the time the State was admitted to representation. * * * When did the people 'ordain and establish this Constitution' [Preamble]? As their act, and not the will of Congress, ordained and established it, this must have been accomplished when the will of the people was manifested at the election [to ratify or reject the proposed Constitution]. At no other time was expression of the will of the people, as to whether or not the Constitution framed by the Convention, should become the Constitution of the State, ever given.

The Constitution fixed the terms of office for State officers, and declared that these should run from the day of general election; and the election declaration, passed by the convention, recognizing that fact, and intending to leave no uncertainty as to the time when the terms of all State, district and county officers should commence, declared that 'the said election, for State, district and county officers, should be conducted under the same regulations as the election for ratification or rejection of the Constitution, and by the same process. * * * * The same declaration also fixed a time at which the Legislature, elected under the Constitution, should meet, as did the Constitution fix the congressional, senatorial and representative districts, in which Congressmen, Senators and Representatives were required to be, and actually were, elected at the same election at which the Constitution was adopted. All these officers were elected, and held under the Constitution, and the members of the Legislature were, by its terms, required, as a legislature, to do acts [*e. g.*, ratify the Fourteenth and Fifteenth Amendments to the Constitution of the United States,] which necessarily preceded the admission of the State to representation in Congress. (Act of Congress, April 10, 1869, 16 Stat. at Large 41; Pas. Dig. art. 1136; Constitution, art. 3, sec. 36.) The entire Constitution bears evidence that it was the intention of the people that it should become operative when adopted by them, and there is nothing in it to indicate an intention that any part of it should be inoperative until Congress admitted the State to representation. If such an intention was evidenced, it should be given effect, for it would be competent for the people of a State, the sole Constitution making power, to determine that a Constitution should not be operative until the happening of a future event, dependent upon the action of some other body; but, as no such intention is evidenced, and as a valid State Constitution might exist without reference to the will of Congress, and although the State, by that body, was denied representation, we are of the opinion that the Constitution became operative, in all its parts, from the time it was ratified by the people. That Congress deemed the condition of the country such, at the time the Constitution was adopted, as to require continuance, for a period thereafter, of a provisional government, and to deny to the State a representation in Congress, until it was satisfied that the Constitution was in harmony with that of the United States, and that the time had come when the provisional government should be withdrawn, is a matter of no consequence in the consideration of the question before us:" STAYTON, A. J., pp. 247, 248, 249, 250.

These last words have reference to

the seventh section of the Act of Congress: "That the proceedings in any of the said States shall not be deemed final, or operate as a complete restoration thereof, until their action, respectively, shall be approved by Congress." The other States besides Texas were Virginia and Mississippi, and decisions there were made to the same effect: *State* v. *Williams* (1873), 49 Miss., 661; *In re Deckert* (1874), opinion by WAITE, C. J., sitting in U. S. Circuit Ct. E. Dist. Va., 10 Natl. Bank. R. R., 1; s. c. 2 Hughes C. C. Rep. 187; *Campbell* v. *Fields* (1872), 35 Texas 752, all cited in the opinion just quoted from. So also *Foster* v. *Daniels* (1869), 39 Ga. 39 decided with regard to the enabling act of Congress of June 25, 1868, and the President's proclamation of July 27, 1868, 15 Stat. at L. 74, 708. And some years earlier in *Secombe* v. *Kittelson* (1882), 29 Minn., 555, this question was stated, but not decided, the Court recognizing the three theories of the time when a Territory becomes a State, and citing *Campbell* v. *Fields*, *supra*, and *Scott* v. *Detroit Young Men's Society Lessee* (1843), 1 Doug. (Mich.) 119, which followed the last of these theories.

An opposite view to that taken in Texas was expressed in Alabama: "Prior to the passage of that Act of Congress [Act of June 25, 1868, 15 Stat. at Large 73, readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida], it had been held by the officers in charge of the election and its returns, that the said Constitution had not been adopted by the votes of the people of Alabama. Hence, we affirm that said Constitution became operative and obligatory in Alabama only on the twenty-fifth of June 1868;" STONE, J., *Irwin* v. *The Mayor* (1876), 57 Ala., 6, 10. The question has never been fully discussed in that State, but always assumed to be answered as above: *Plowman* v. *Thornton* (1875), 52 Ala. 559, 567-8.

Several years previous, the Court of Appeals, which is the next inferior Court, had been called upon to decide the time when an Amendment to the Constitution of Texas took effect, so as to render void a session of a County Court, whereat there had been a conviction for aggravated assault and battery. The election for the adoption of the proposed Amendments took place August 7, 1883, and no special provision having been made for the counting of the votes, that duty by the general law fell to the Secretary of the State, on the fortieth day after the election. The trial occurred September 8, 1883, during the forty days, and was held valid. "It is unnecessary for us, in this case, to decide whether, under the provisions" of Article 17 of the Constitution, that *the said amendment, so receiving a majority of the votes cast, shall become a part of the Constitution, and proclamation shall be made by the Governor thereof*—"an Amendment, *eo instanti*, becomes operative, or whether it derives its operative force from the Governor's proclamation, declaring the fact of its adoption. We are clearly of opinion, however, that until after the expiration of forty days from the election, under our general election laws, the amendments, until the returns are opened and counted by the Secretary of State, can in no manner be considered as operative, so as to affect, modify, change or nullify existing laws." WHITE, P. J. *Sewell* v. *The State* (1883), 15 Texas. App. 56, 61.

In the same term the said Court was called upon to decide whether a criminal trial, held after the votes on these same Amendments had been counted, but before the Governor's proclamation, was subject to these Amendments. "Our construction of this provision is

that it is the ascertained majority of the vote of the people, and not the proclamation of the Governor, which gives force and effect to Amendment. If the Governor were to neglect or refuse to issue such proclamation, the amendment would, nevertheless, be a part of the Constitution of the State, because it it is the will of the people, expressed in the mode prescribed by their organic law. It certainly never was intended that it should be within the power of the Governor thus to defeat the solemnly declared will of the people. We are of opinion, therefore, that as soon as the election returns were canvassed, and it was ascertained that a majority of the votes cast were in favor of the amendment, it became a part of the Constitution and was in full force and effect from that date:" Willson, J. *Wilson* v. *The State* (1883), 15 Texas. App. 150, 153.

This latter position of the Texas Court quite agrees with *The Comm.* v. *Collins* (1839) 8 Watts (Pa.) 331, where the recent Amendments to the Constitution of Pennsylvania were, according to the second section of the accompanying Schedule, to "take effect from the first day of January, 1839." Upon the time when these Amendments were adopted, not when they took effect, depended the right of Judge Oristus Collins to the office of President Judge of the Lancaster County Court. Counsel for the defendant, Collins, contended, among other things, "that the bare ascertainment of the vote of the electors, approving of the Amendments proposed by the Convention cannot, with any color of propriety, be regarded as the adoption of the Amendments; that it could, at most, only amount to a promulgation of the vote given thereon; so that the citizens throughout the State might become informed thereof before the first day of January, 1839, when the Amendments, according to the express declaration contained in the second section of the Schedule, were to take effect. * * that the general election in October, 1838, being the time when the people, by their vote, approved of the Amendments, may very properly be regarded as the time when they, by their vote then given, *agreed* merely that the Amendments should be received into, and *adopted* as constituent parts of the Constitution on the first day of January, 1839." (Per KENNEDY, J., id. 338). But the Court denied these propositions, citing *Owings* v. *Speed* (1820) 5 Wheat. (18 U. S.) 420, to the effect that a constitution may be adopted even anterior to the time of its coming into effect, and adding that "Under this view, we have come to the conclusion that the Convention, in using the expression — 'at the adoption of the Amendments to the Constitution,' could not have intended to refer to a later point of time than the day when the result of the vote of the electors thereon was to be ascertained and made known by the Speaker of the Senate, from the official returns thereof. And it may be that an earlier point of time was intended; but according to our construction of the Amendments, as regards the main question before us, it is not material whether an earlier day was intended or not." (id. 341.)

HUSTON, J., in the course of his dissenting opinion, said—"Neither the Legislature, nor any branch of it, were required to do any act, except count the votes and certify the result; and the Governor had no duty, nor power, except to proclaim the result. The sanction of neither Legislature nor Governor was required, and whether they approved, or disapproved of it, did not affect its validity. The people, by their votes, approved, or adopted, or ratified, or established it, and they acted on the ninth of October, 1838.

In a popular sense, they then adopted it; but they adopted it as written, and no otherwise. A Schedule was subjoined to it, and forms part of it; most of its provisions are temporary, and when once acted on become useless; but they have the same force and obligation as the other parts of the instrument, and are derived from the same source, viz.: the people." (8 Watts Pa. 348.) The dissent then proceeds to identify the time of the adoption of the Amendments with the time fixed by the Schedule, for their taking effect. A similar conclusion, was reached, years afterwards, in New York; see *infra*, page 249: *The People* v. *Gardner* (1871), 45 N. Y. 812. As applied to the facts of the principal case, these differences amount to nothing, as they merely serve to emphasize the power of a Schedule, or Ordinance, or special provision to override pre-existing laws or constitutional provisions.

The Texas decisions are thus at one but do not reach the extreme of the principal case, whose correctness depends, like the Pennsylvania cases, upon the power of the instrument itself, including the Ordinance as part of the Constitution.

The opposite view had, long previous, been expressed by BUCHANAN, J., dissenting from the opinion of the Court in *Sigur* v. *Crenshaw* (1853), 8 La. An. 401, 426. The majority of the Court held that a new constitution superseded a previous one, and did not operate as an amendment, so as to continue existing laws. The dissenting judge said—"I cannot concur to its full extent, in the view taken by the relator, of the effect of the promulgation of the new Constitution of Louisiana, in the place of the old one, which was abrogated; namely, that without some saving clause, it would have dissolved the whole frame of government, and the obligation of laws previously enacted. Such results belong to revolution the offspring of intestine commotion, or of foreign conquest, which changes the allegiance of a nation, substituting monarchy or oligarchy, for democracy, or *vice versa*,—or which reduces an independent state into a subject province. They have nothing in common with the peaceful changes so frequent in their occurrence, which the combined republics of our political confederation find it expedient from time to time, to introduce into the details of administration of a government always essentially the same, because it always recognizes the same source of authority—the people." These sentiments never attained to any further judicial dignity: in Louisiana, the majority view was reaffirmed in *The State* v. *Dubuc* (1854), 9 La. An. 237

More nearly resembling the principal case is that of *The State ex rel. Hudd* v. *Timme* (1882), 54 Wis. 318. The relator sought by mandamus, to have the Secretary of State audit his salary as State Senator, under the provisions of certain Constitutional Amendments which did not specifically provide for the time of their operation. The Court examined into the mischief, and the remedy and then construed the Amendments, saying (per *Taylor*, J.)—"It would be absurd to hold that there was any intention, on the part of either the legislature or the people, to interrupt the regular course of government of the State by the adoption of these amendments." (p. 327.) And the Court held, under such circumstances, that the Amendments did not go into effect until an election had been held for senators and representatives, and quashed the mandamus.

This decision was largely based upon an opinion of the Justices of the Supreme Judicial Court of Massachusetts in 1855, in response to certain questions proposed by the Governor and Council of

that State: reported, 3 Gray (Mass.) 601. An Amendment to the State Constitution, adopted that year, contained no express repeal of pre-existing provisions of the Constitution, and, to come into practical operation, required legislation, dividing the State into districts, before the members of the Council could be voted for. Consequently the pre-existing provisions of the Constitution governed in the meantime: id. 602, 604. But upon another point, the opinion significantly proceeds: "The fourth article provides for the election of the secretary, treasurer, auditor and attorney general. The time for giving in of the votes for these officers, the mode of declaring, certifying and returning the votes, are all definitely provided for by the article itself, so that no legislation is necessary to give it effect. * * * * But as this Amendment of the Constitution, and the elections made under it, cannot so operate as to fill these offices, until the third Wednesday of January next, we are of opinion, that, up to that day, appointments to these offices are to be made, removals effected, and vacancies filled, in the same manner as if this Amendment of the Constitution had not been made:" id. 604.

The Wisconsin Court also referred to *State* v. *Scott* (1849), 9 Ark. 270, where the Court sustained the response to a *Quo Warranto*. An Amendment to the State Constitution provided that "The qualified voters of each judicial circuit in this State, shall elect their circuit judge." The Court held that this did not vacate the offices of existing circuit judges, but that they might serve out their respective terms. "If the Amendment will bear such a construction as to allow other provisions of the Constitution to stand without doing violence to any, it is then clearly permissible to put such a construction upon it. If the intention was to create vacancies, is it not fair and reasonable to suppose that words would have been employed, directly and emphatically declarative of that purpose, and that no room would have been left for doubt or construction?"—JOHNSON, C. J., p. 277. And WALKER, J., equally with the Chief Justice, planted himself upon the rules laid down by Story, Com. on Const. §§400, 405, 419.

SCOTT, J., dissented on the ground "that the presumptions of law are always in favor of the immediate operation and effect of the organic law, when applied to a convention of the people assembled for the purpose of remodeling the entire State Government; or, for the moment, doubt that the new Constitution adopted by such convention, would be in force from the moment of its adoption, unless provision should be made in the instrument itself to postpone its operation and effect to a future day. And I will take the occasion here, to remark that, so far as my research has extended, with all the facilities afforded by the able and industrious counsel, I have found that it has been the uniform course in all the States of this confederacy, not only when the entire State Government has been remodelled, but also in cases where amendments to the Constitution have been adopted, which, like this one, withdraws sovereign powers, or which necessarily disorganizes some part of the existing government, to adopt simultaneously with such Constitution, or such new amendment, a schedule or proviso, to sustain the old state of things, and prevent *pro tem.* the disrupting influence of the new Constitution or amendment." id. 294.

Another reference of the Wisconsin Court was to *State* v. *Ewing* (1853), 17 Mo. 515, which was a similar case to to that before the Arkansas Court and was similarly decided, the incumbent being the Secretary of State.

Still another reference was to *The People* v. *Gardner* (1871), 45 N. Y. 812, affirming s. c. 59 Barb. (N. Y.) 198. The Supreme Court was called upon to construe a constitutional provision respecting the judiciary which was to be in force "from and including the first day of January, next after its adoption by the people," in connection with another provision affecting judges "in office at the adoption of this article." Following an earlier decision in *Real* v. *The People* (1870), 42 N. Y. 270, the Court of Appeals distinguished these two provisions through the use of the words "by the people" in one of them, so that where these words were omitted, "the adoption of this article" meant no more than "the time when this article took effect," but where the full phrase "adoption by the people" was used, that meant an earlier day, namely, when the votes had been completed. That is, constitutional provisions have force and effect as soon as their own words indicate.

As this New York decision, in respect to the time when the people adopted, or expressed their will in respect to the proposed constitutional provision, appears to be similar to the older Pennsylvania case (*ante*, page 247), an extract from the opinion will be interesting in connection with the principal case. "The rule of the common law is, that every law takes effect from its passage, unless some other time is therein prescribed for that purpose: 1 Kent's Com. 458; Sedgwick's Stat. and Const. Law, 82 [2 ed. p. 66]." The opinion then proceeds:—"The result of the election, showing the adoption of this article by a majority of the votes cast, must, within the meaning of this rule, be deemed its passage. The canvass of the votes cast by the various boards of canvassers, as required by law, and announcing the result, and certifying the same as required by law, is as much a part of the election as the casting of the votes by the electors. The election is not deemed complete until the result is declared by the canvassers, as required by law. When the result was declared by the State board of canvassers, the article was adopted, and under the rule became operative at once, unless from the nature of the provisions themselves, or those of some other law, it appears that it was to take effect at some future period, or unless it clearly appears that the intention of the framers of the article, and of those by whom it was adopted, was, that it should not take effect until some definite future time:" GROVER, J., *Real* v. *The People* (*supra*).

The attentive reader will already have observed that the Courts have not yet decided what is the earliest time when a constitutional provision takes effect. In the principal case, the enabling Act rendered a decision on this point unnecessary: equally so in the Texas case (page 245). In a subsequent case in Texas (page 246), and in earlier ones in Pennsylvania and New York (pages 247, 249–50), the time was fixed as soon as the fact of a majority of votes in favor of the constitutional provision had been ascertained, upon a complete canvass of the votes. The announcement of the result of the election was not the earliest period of time, because the officials might not make the announcement. Whether the counting of the votes in each precinct, and before these results of the election were officially aggregated, would be held to be an instant when the constitutional provision had been adopted, may be doubted, though any failure of election officials to secure the completion of the counting of the votes might urge the Court to fix so early a period as election day itself (see page 247).

The sum of the matter is, that a constitutional provision takes effect from the instant the will of the people has been ascertained. JOHN B. UHLE.